

DEPARTMENT OF STATE REVENUE**LETTER OF FINDINGS NUMBER: 99-0372****Withholding Tax – Responsible Officer
For 1997**

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ISSUE**I. Responsible Officer Liability – Duty to Remit Withholding Tax**

Authority: Ind. Code § 6-3-4-8;
Ind. Code § 6-8.1-5-1;
Indiana Department of State Revenue v. Safayan, 654 N.E.2d 270 (Ind. 1995).

The taxpayer protests the assessment of withholding liability as a responsible officer.

STATEMENT OF FACTS

The taxpayer is one of two sole shareholders of an Indiana company that did not submit sufficient withholding taxes to the Department of Revenue for the year 1997. The Department assessed liability for the taxes to the taxpayer. The taxpayer is protesting the determination that he is liable as a responsible officer based on the argument that the other shareholder was the person responsible for the payment of withholding taxes to the Department. The taxpayer did not submit any evidence prior to the telephone conference showing that he was not responsible for the taxes owed. The taxpayer's representative stated during the telephone conference that there was a "corporate resolution" which stated that the other shareholder was the only corporate officer. The taxpayer was given an additional week after the telephone conference to submit evidence to show he was not a responsible officer. The evidence submitted consisted of several copies of checking account statements and copies of six cancelled checks which were signed by the other sole shareholder. No "corporate resolution" was submitted. Additional facts will be provided as necessary.

I. Responsible Officer Liability – Duty to Remit Withholding Taxes

DISCUSSION

The taxpayer argues that he is not liable for the withholding taxes he was assessed with. He maintains that he was merely an investor and did not oversee the operation of the corporation. The taxpayer points out that he resided in Lafayette, Indiana, the corporation was located in Indianapolis, Indiana, and the taxpayer seldom visited the corporation. The taxpayer states that he was the vice president of the corporation while the other shareholder was the president. The taxpayer asserts that the other shareholder had assured him that all taxes were being paid and that in September, 1997, unknown to the taxpayer, the other shareholder opened a bank account in Indianapolis for the purpose of diverting funds from the corporation for the other shareholder's personal use.

"The notice of proposed assessment is *prima facie* evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." Ind. Code § 6-8.1-5-1(b). The evidence submitted by the taxpayer shows only that the other shareholder signed some checks and that there was a checking account in the corporation's name. This evidence, however, is not sufficient to satisfy the taxpayer's burden of proof. The taxpayer has failed to submit any evidence to show that he was not a responsible officer and thus, he is liable for the taxes due.

Ind. Code § 6-3-4-8(a)(1) provides:

Except as provided in subsection (d) [not relevant], every employer making payments of wages subject to tax under IC 6-3, regardless of the place where such payment is made, who is required under the provisions of the Internal Revenue Code to withhold, collect, and pay over income tax on wages paid by such employer to such employee, shall, at the time of payment of such wages, deduct and retain therefrom the amount prescribed in withholding instructions issued by the department. . . . Such employer making payments of any wages:
(1) shall be liable to the state of Indiana for the payment of the tax required to be deducted and withheld under this section

Ind. Code § 6-3-4-8(f) states in relevant part:

All money deducted and withheld by an employer shall immediately upon such deduction be the money of the state, and every employer who deducts and retains any amount of money under the provisions of IC 6-3 shall hold the same in trust for the state of Indiana and for payment thereof to the department in the manner and at the times provided in IC 6-3.

Additionally, Ind. Code § 6-3-4-8(g) states in relevant part:

In the case of a corporate or partnership employer, every officer, employee, or member of such employer, who, as such officer, employee, or member is under a duty to deduct and remit such taxes shall be personally liable for such taxes, penalties, and interest.

The Indiana Supreme Court has identified three factors to consider when determining liability as a responsible officer: 1.) the person's position within the structure of the corporation;, 2.) the authority of the person as established by the articles of incorporation, bylaws, or the person's employment contract; and 3.) whether the person actually exercised control over the corporation's finances. Indiana Department of State Revenue v. Safayan, 654 N.E.2d 270, 273 (Ind. 1995). In the instant case, the taxpayer admits that he was vice president of the company during the time period when the withholding taxes were due. The taxpayer was one of only two corporate officers and one of only two corporate shareholders. The taxpayer is a responsible officer as defined by the Court in Safayan and is, therefore, personally liable for the payment of the withholding taxes.

FINDING

The taxpayer's protest is denied.